TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 184.

JOHN MONTGOMERY, JR., ASSIGNEE OF STEWART, PORTER & CO., PLAINTIFF IN ERROR,

vs.

THE BUCYRUS MACHINE WORKS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

FILED JUNE 1, 1874.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the western district of Missouri, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, at the April term, 1874, thereof, between John Montgomery, jr., assignee of Stewart, Porter & Co., plaintiff, against Bucyrus Machine Works, a manifest error hath happened, to the great damage of the said plaintiff, as by his complaint appears:

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the Monday of next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, this day of , in the year of our Lord one thousand eight hundred and seventy-four.

Issued at office in the city of Washington, with the seal of the circuit court of the United States for the districts of Missouri, dated as aforesaid.

[SEAL.]

M. M. PRICE,
Clerk C. C. U. S. Missouri Districts.
By C. M. WARD,
Deputy.

Allowed by—

JOHN F. DILLON,
Judge.

2 THE UNITED STATES,
Western District of Missouri:

I, M. M. Price, clerk of the circuit court of the United States in and for the western district of Missouri, in obedience to the mandate of the within writ, herewith transmit to the Supreme Court of the United States a full, true, and complete transcript of the record and proceedings had in the within-entitled cause as fully as the same remain of record and on file in my said office.

Witness my hand and seal of said court this 7th day of May, A. D. 1874.

[SEAL.] M. M. PRICE, *Clerk.*

(Indorsed:) No. 24. United States circuit court districts of Missouri. Jno. Montgomery, jr., assignee, vs. Bucyrus Machine Works. Writ of error to the circuit court of the United States for the western district of Missouri. Returned and filed, Apr. 187 . , clerk.

3 The United States of America to Bucyrus Machine Works, or to Lay & Belch, its atty'. of record, greeting:

You are hereby cited and admonished to be and appear at a Supreme

Court of the United States *for the western district of Missouri*, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the western district of Missouri, wherein Jno. Montgomery, jr., assignee of Stewart, Porter & Co., is plaintiff in error, and the Bucyrus Machine Works is deft. in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Jno. F. Dillon, judge of the circuit court of the United States for the western district of Missouri, this 24' day of April, in the year of our Lord one thousand eight hundred and seventy-four.

JOHN F. DILLON,
Judge United States Circuit Court Western District of Missouri.

4 (Indorsed:) United States circuit court, western district of Missouri. John Montgomery, jr., assg. Stewart and Morgan, vs. The Bucyrus Machine Works. Citation. Filed Apr. 24th, 1874. M. M. Price, clerk, by C. M. Ward, D. C.

We hereby acknowledge service of this notice by copy this 24' day of Apl., 1874.

LAY & BELCH,
For Defendant.

5 In the circuit court of the United States for the western district of Missouri.

Be it remembered, that in vacation of said court, and on the 16th day of November, A. D. 1872, there was filed in the office of the clerk of said court a certain transcript, in words and figures following, to wit:

Be it remembered, that in vacation, on the 8th day of July, 1872, a petition was filed in the office of the circuit clerk of the county of Pettis and State of Missouri, which is in words and figures as follows:

Petition.

Circuit court, Pettis county, Mo.

JOHN MONTGOMERY, ASSIGNEE OF JOHN R. Stewart and William H. Porter, composing the firm of Stewart, Porter & Co., plaintiff,
against
BUCYRUS MACHINE WORKS, DEFT*d*.

Plaintiff, John Montgomery, would respectfully make known that on the 18th day of June, 1870, the above-named John R. Stewart and William H. Porter, composing the firm of Stewart, Porter and Co., were declared bankrupts by the district court of the United States for the western district of Missouri.

6 That afterwards, to wit, on the 19th day of July, 1870, your petitioner was duly elected assignee for said bankrupts, and on the 28th day of July, 1870, Milo Blair, esqr., register in bankruptcy, by deed of assignment duly acknowledged and delivered as the law directs, transferred and conveyed to your petitioner all and singular the estate and assets of the said bankrupts, whereby this complain't became and

is the legal owner of the same, and has the right to sue for and recover the same.

Plaintiff further states that, prior to the adjudication of bankruptcy of the said Stewart, Porter & Co., they entered into a written contract with said defendants, to the effect following, to wit: That, on the 14th day of , 1870, the said Stewart, Porter & Co. bought of the defendant, the Bucyrus Machine Works, one car-load of combined machines, (droppers,) containing twenty machines, being reaping and mowing machines, to be shipped not later than May 1, 1870, and as much sooner as the said Stewart, Porter & Co. might request, said machines to be boxed in the customary manner of boxing harvesters, and delivered on board the cars in Bucyrus, Ohio, the said Stewart, Porter & Co. to pay
7 one hundred and eighty-five dollars for each machine so sent, less a discount of twenty-two per cent., and at the times, as follows, to wit: One-half of the whole amount on or before October 1, 1870, with interest from the 1st day of August, 1870, and the balance on the 1st day of January, 1871, with interest from the 1st day of August, 1870. And it was further agreed upon the part of the said Bucyrus Machine Works that they were to fill, as far as possible, all orders for machines sent them by the said Stewart, Porter & Co., upon the same terms and conditions as above stated. And it was further agreed that if, at the end of the selling season in 1870, any of the machines so ordered should remain on hand unsold, the said Stewart, Porter & Co. were to take them and make payment therefor to the Bucyrus Machine Works, as follows: One-half of the whole amount on the 1st day of October, 1871, and the balance on the first day of January, 1872, with interest from the 1st day of August, 1871.

It was further agreed in said contract that on all machines not sold by Stewart, Porter & Co., in 1870, and held over, they, said Stewart, Porter & Co., were to be allowed any decline in price of said machines for the season of 1871.

Plaintiff further states that said contract between the said Stewart, Porter & Co. and the defendant, the Bucyrus Machine Works, is now on file in the clerk's office of the clerk of the United States district court
8 for the western district of Missouri, amongst the papers in the case of this plaintiff against the defendant herein, pending in said court, and cannot be herein filed.

Plaintiff further states, that afterwards, to wit, on the 2d day of April, 1870, the said Stewart, Porter & Co. ordered, under said contract, fifty combined reapers and mowers from said defendant, which were shipped to said Stewart, Porter & Co. by said defendant, to Sedalia, Missouri; that afterwards, to wit, about the first day of May, 1870, the said Stewart, Porter & Co. sold eleven of said machines to Messrs. Brown, Clay & Co., of Pleasant Hill, Cass County, Missouri, at the price and sum of one hundred and eighty-five dollars each, amounting to the sum of two thousand and thirty-five dollars; that at the same time said Stewart, Porter & Co. sold six of said machines to Case & Larkin, at Knob Noster, Johnson County, Mo., for the price and sum of one hundred and eighty-five dollars each, amounting to the sum of eleven hundred and ten dollars; that said Stewart, Porter & Co. sold one of said machines to Thomas Kirkpatrick, of Warrensburg, Johnson County, Missouri, for the price and sum of one hundred and eighty-five dollars.

Plaintiff further states that the said Stewart, Porter & Co., being bankrupt and insolvent, or in contemplation of bankruptcy and insolvency, and with the intent to give a preference to one of their
9 creditors, to wit, the said Bucyrus Machine Works, directed and

consented that the said Brown, Clay & Co., the said Case & Larkin, and the said Thomas Kirkpatrick should pay over to the defendant the price of said machines sold as aforesaid to them by said Stewart, Porter & Co., instead of paying it to the said Stewart, Porter & Co.; and plaintiff alleges the fact to be that said Brown, Clay & Co., and Case and Larkin, and Thomas Kirkpatrick did pay over to the said Bucyrus Machine Works the sums of money owing by them respectively to the said Stewart, Porter & Co., to wit, two thousand and thirty-five dollars, and eleven hundred and ten dollars, and one hundred and eighty-five dollars; the said defendant, the Bucyrus Machine Works, then and there having reasonable cause to believe that a fraud on the bankrupt law was intended, and that said Stewart, Porter & Co. were insolvent.

Wherefore, by reason of the premises, the plaintiff is entitled to recover of the defendant the sum of three thousand three hundred and thirty dollars, and for which said sum, with interest thereon, plaintiff asks judgment.

Plaintiff further states, the said Stewart, Porter & Co., some time in the month of May, 1870, sold to Thomas Kirkpatrick, of Warrensburg, Johnson County, Missouri, twenty-two combined reapers and mowers, at the price and sum of one hundred and eighty-five dollars each,
10 amounting to the sum of four thousand and seventy dollars; that in the month of May, 1870, the said Stewart, Porter & Co. sold to Brown, Clay & Co., of Pleasant Hill, Cass County, Missouri, twenty-two combined reapers and mowers, at the price and sum of one hundred and eighty-five dollars each, amounting to the sum of four thousand and seventy dollars.

Plaintiff states that afterwards the said Stewart, Porter & Co. ordered forty-four combined machines from the said defendant, the Bucyrus Machine Works, under their contract aforesaid, and directed them to be shipped, twenty-two of them to the said Thomas Kirkpatrick, and twenty-two of them to the said Brown, Clay & Co., to thereby fill the sales made to them by the said Stewart, Porter & Co., and in pursuance of said order said machines were so shipped directly from Bucyrus, Ohio, and delivered to the said Thomas Kirkpatrick at Warrensburg aforesaid, and to Brown, Clay & Co. at Pleasant Hill aforesaid, for and on account of the said Stewart, Porter & Co., and under and in pursuance of the contract aforesaid between the said Stewart, Porter & Co. and the defendant.

Plaintiff further states, that the said Stewart, Porter & Co., being bankrupt and insolvent, and in contemplation of bankruptcy and insolvency, and with intent to give a preference to one of their creditors, to wit, the said Bucyrus Machine Works, directed and consented
11 that the said Thomas Kirkpatrick and the said Brown, Clay & Co. should pay over to the defendant the price of said machines sold as aforesaid to them by said Stewart, Porter & Co., instead of paying it to the said Stewart, Porter & Co.; and plaintiff alleges the fact to be that the said Thomas Kirkpatrick and the said Brown, Clay & Co. did pay over to the said Bucyrus Machine Works the sums of money owing by them respectively to the said Stewart, Porter & Co., to wit, four thousand and seventy dollars each; the Bucyrus Machine Works then and there having reasonable cause to believe that a fraud on the bankrupt law was intended, and that said Stewart, Porter & Co. were insolvent.

Wherefore, by reason of the premises, the plaintiff is entitled to recover of the defendant the sum of eight thousand one hundred and forty dol-

lars, and for which said sum, with interest thereon, plaintiff asks judgment.

Plaintiff further states, that some time in the month of April, 1870, the said Stewart, Porter & Co. ordered twenty-five other machines—combined reapers and mowers—from the Bucyrus Machine Works, under the contract aforesaid, and ordered them to be shipped from Bucyrus, Ohio, a part to Messrs. Maury & Co., at St. Louis, Missouri, and a part to Messrs. Deere, Mansur & Co., at Kansas City, Missouri, and that said machines were shipped in pursuance of said order and said
12 contract, as above stated, and received by said Maury & Co. and Deere, Mansur & Co. on account of the said Stewart, Porter & Co.

That afterwards the said Stewart, Porter & Co. also sold said twenty-five machines to divers persons, to this plaintiff unknown, (to whom they were delivered,) at the price and sum of one hundred and eighty-five dollars each, amounting to the sum of four thousand six hundred and twenty-five dollars.

Plaintiff further states, that the said Stewart, Porter & Co., being bankrupt and insolvent, or in contemplation of bankruptcy and insolvency, and with intent to give a preference to one of their creditors, to wit, the said Bucyrus Machine Works, directed and consented that the said parties to whom said machines had been sold as aforesaid by said Stewart, Porter & Co. should pay over to the defendant, the Bucyrus Machine Works, the price of said machines, instead of paying it to the said Stewart, Porter & Co.; and the plaintiff alleges the fact to be that the said parties did pay over to the said Bucyrus Machine Works the said money, to wit, the sum of $4,625, owing by them to the said Stewart, Porter & Co.; the said defendant, the Bucyrus Machine Works, then and there having reasonable cause to believe that a fraud on the bankrupt law was intended, and that said Stewart, Porter & Co. were in-
13 solvent. Wherefore, by reason of the premises, the plaintiff is entitled to recover of the defendant said sum of four thousand six hundred and twenty-five dollars, and for which, with interest, he asks judgment.

JOHN MONTGOMERY,
Assignee, &c.
By PHILLIPS AND VEST.
EWING AND SMITH.

And afterwards, to wit, a summons was attached on the back of said petition, which is in words as follows:

Summons.

STATE OF MISSOURI,
County of Pettis, ss:

The State of Missouri to the sheriff of St. Louis County, greeting:

We command you to summons the Bucyrus Machine Works that it be and appear in our circuit court, to be held at the court-house in the city of Sedalia, in said county, on the 1st Monday in September next, 1872, then and there, before the judge of our said court, to answer the petition of John Montgomery, assignee of John R. Stewart and William H. Porter, composing the firm of Stewart, Porter & Co., (a certified copy of which said petition is hereto annexed,) and this you shall in nowise omit; and have you then and there this writ.

Witness my hand as clerk of our said court and the seal thereof.
14 Done at office in Sedalia, in the county aforesaid, on the 8th day of July, 1872.

[SEAL.] E. P. KENT, *Clerk.*

On the back of which said summons is endorsed the sheriff's return, which is in words & figures as follows:

Return.] *Sheriff's return.*

Executed this writ in St. Louis County, on the 13th day of July, 1872, by delivering a copy of the writ & petition, as furnished by the clerk, to E. P. Gleason, agent of the Bucyrus Machine Works, who was in the business office of the said Bucyrus Machine Works at the time of said service, and had charge thereof. The president of the said Bucyrus Machine Works cannot be found in my county.

PHILIP C. TAYLOR,
Sheriff St. Louis County, Mo.,
By R. O. TAYLOR, *Dep'ty.*

Afterwards, to wit, on the 7th day of September, 1872, a bond was filed, which was in words and figures as follows:

Bond for removal.

In the circuit court of Pettis County, Mo.

JOHN MONTGOMERY, ASSIGNEE OF JOHN R. Stewart and William H. Porter, composing the firm of Stewart, Porter & Co.,
15 *against*
BUCYRUS MACHINE WORKS.

We, the Bucyrus Machine Works, a corporation incorporated under the laws of the State of Ohio, as principal, and John J. Yeater, of the county of Pettis, in the State of Missouri, as surety, are held and firmly bound unto John Montgomery, assignee of John R. Stewart and William H. Porter, composing the firm of Stewart, Porter & Co., of the county Pettis, in the State of Missouri, in the sum of one hundred dollars, lawful money of the United States of America, to be paid to the said John Montgomery, assignee as aforesaid, his successors or assigns, for which payment, well and truly to be made, we hereby bind ourselves, our heirs, executors, and administrators, firmly by these presents, sealed with our seals, dated this 7th day of September, 1872.

The condition of the above is such, that whereas a suit was brought, on or about the day of , 1872, in the circuit court of Pettis County, Missouri, by the said John Montgomery, assignee as aforesaid, against the Bucyrus Machine Works, and the same is now pending for trial in the said circuit court of Pettis County, Missouri, and is removable into the circuit court of the United States for the western
16 district of Missouri, in the eighth circuit, under and pursuant to the act of Congress in such case made and provided; and whereas the said Bucyrus Machine Works has filed its petition in the said circuit court of Pettis County for the removal of said suit into the next circuit court of the United States, to be held in the city of Jefferson, in the western district of Missouri:

Now, therefore, the condition of the above obligation is such, that if the above-bounden Bucyrus Machine Works shall enter, or cause to be entered, in the circuit court of the United States for the western district of Missouri, on the first day of its stated session next ensuing, after the order of the said circuit court of Pettis County, Missouri, for the removal of said suit into the said circuit court, copies of all process, pleadings, depositions, testimony, and other proceedings in said suit, and do, or cause to be done, such other appropriate acts as by the act of Congress approved September, 1789, are required to be done upon the removal of a suit into the United States court, then the above obligation to be void; otherwise to remain in full force and virtue.

BUCYRUS MACHINE WORKS,
By LAY & BELCH, *its Attorneys.* [SEAL.]
JOHN J. YEATER. [SEAL.]

STATE OF MISSOURI,
County of , *ss:*

The surety in the foregoing obligation named, being duly sworn,
17 deposes and says, that he is a resident of the county of , in the State of Missouri, and a householder therein, and is worth the sum of dollars, over all his just debts and liabilities, and exclusive of property exempt by law from execution.

And afterwards, to wit, on said 7th day of September, 1872, a petition was filed in the office of the circuit clerk of the county of Pettis, and State of Missouri, for the removal of cause to the United States circuit court for the western district of Missouri, which is in words and figures as follows:

Petition for removal.

In the circuit court of Pettis County, State of Missouri.

JOHN MONTGOMERY, ASSIGNEE OF JOHN R. Stewart and William H. Porter, composing the firm of Stewart, Porter & Co., plaintiff,
against
BUCYRUS MACHINE WORKS, DEFDT.

The petition of the Bucyrus Machine Works, of the city of Bucyrus, County of Crawford, State of Ohio, respectfully shows, that your petitioner is the defendant in the above-entitled suit, and that the said suit was brought by John Montgomery, jr., assignee of the said John
18 R. Stewart and Wm. H. Porter, composing the firm of Stewart, Porter & Co., plaintiff, on or about the day of , 1872, in the circuit court of Pettis County, Missouri, to be begun and held in said county on the first Monday in September, 1872; and that the said plaintiff is and was at the time of the commencement of said suit, a citizen of the county of Pettis and of the State of Missouri; and that your petitioner is and was at the time of the commencement of said suit, a corporation duly incorporated under the laws of the State of Ohio; and your petitioner is and was at the time of the *time of the* commencement of said suit a citizen of Ohio, and that its officers, directors, and stockholders are each and all of them citizens of the State of Ohio. Your petitioner further shows that the said plaintiff claims in his said petition in said suit, as against your petitioner, the sum of sixteen thou-

sand and ninety dollars, and that the matter in dispute in this suit exceeds the sum of five thousand dollars, exclusive of costs.

Your petitioner further represents, that said suit has not yet been tried, but is pending for trial in the said circuit court of Pettis County, Missouri, and that your petitioner desires to remove the said suit, before the trial thereof, into the circuit court of the United States to be held at the city of Jefferson, in the western district of Missouri, in the eighth circuit, in pursuance of the provisions of the act of Con-
19 gress in such case made and provided, and that *he* is ready and willing to give such good and sufficient security as this court may direct for the doing of all acts and things required to be done by law upon the removal of said suit into said United States court; and your petitioner tenders herewith its bond, executed by John J. Yeater, of Pettis County, in the sum of one hundred dollars, conditioned that your petitioner shall enter into the next circuit court of the United States, to be held in the city of Jefferson, in the western district of Missouri, in the eighth circuit, on the first day of its session, copies of all process, pleadings, deposition, testimony, and other proceedings in this suit, and doing such other appropriate acts as by the said act of Congress, approved September 24th, 1789, are required to be done upon the removal of a suit into the United States court.

Wherefore your petitioner prays that said bond may be accepted, and that the said suit may be removed into the next circuit court of the United States, to be held in the city of Jefferson, in the western district of Missouri, in the eighth circuit, pursuant to the statute of the United States in such case provided, and that no further proceedings may be had herein in this court.

BUCYRUS MACHINE WORKS,
By LAY & BELCH, *its Attorneys.*

20 And afterwards, to wit, at a regular term of the circuit court held and begun at the court-house in the city of Sedalia, in the county of Pettis, and State of Missouri, on the 7th day of September, 1872, it being the 6th day of said term, the following entry was made of record, to wit:

Order for removal.

JOHN MONTGOMERY, ASSIGNEE OF JOHN R. Stewart and William H. Porter, composing the firm of Stewart, Porter & Co.,
against
BUCYRUS MACHINE WORKS.

Upon the reading and filing of the petition of the above-named Bucyrus Machine Works, defendant herein, for the removal of this suit into the circuit court of the United States for the western district of Missouri, in the eighth circuit, in pursuance of the laws of the United States relating to the removal of suits from the State courts, and upon filing the security offered by said defendant according to the requirements of said laws, and on motion of Messrs. Lay & Belch, attorneys for said defendant, and Messrs. Phillips and Vest, attorneys of said plaintiff, consenting thereto, it is hereby ordered that the said security be accepted, and the said suit be removed into the next circuit court of the United States to be held in the said western district of Missouri, and that no further proceedings be had in said suit in this
21 court.

STATE OF MISSOURI,
County of Pettis, ss:

I, E. P. Kent, clerk of the circuit court within and for the county of Pettis, and State aforesaid, do hereby certify that the above and foregoing is a true, full, and complete transcript of the petition and papers and entries of record now on file and of record in my office.

In witness whereof I have hereto set my hand and affixed the seal of said court. Done at office in Sedalia, this 15th day of November, 1872.

E. P. KENT, *Clerk*,
By J. W. STEWART, *D. C.*

Filed Nov. 16th, 1872.

A. S. KREKEL, *Clerk.*

And afterwards, to wit, at a stated term of the circuit court of the United States for the western district of Missouri, begun and held on the third Monday, the 18th day, of November, 1872, and on the 27th day of said month, the following appears of record, to wit:

JOHN MONTGOMERY, JR., ASSIGNEE OF STEWART & PORTER, bankrupts,
vs.
THE BUCYRUS MACHINE WORKS.

22 Now at this day comes the plaintiff, by Ewing & Smith, his attorneys, and file an amended petition herein.

And be it further remembered that, at the April term, A. D. 1874, of said last-mentioned circuit court, the following is made of record in said cause, to wit:

United States circuit court, western district of Missouri, April term, 1874.

JOHN MONTGOMERY, JR., ASSIGNEE OF JOHN R. Stewart & Wm. H. Porter, composing the firm of Stewart, Porter & Co., plaintiff,
against
BUCYRUS MACHINE WORKS, DEFENDANT.

Be it remembered that, on this 23d day of April, 1874, the above case came up for trial. Plaintiff read his amended petition as follows, to wit:

Amended petition.

Circuit court, Pettis County, Mo.

JOHN MONTGOMERY, JR., ASSIGNEE OF JOHN R. Stewart and William H. Porter, composing the firm of Stewart, Porter & Co., plaintiff,
against
BUCYRUS MACHINE WORKS, DEFT.

Plaintiff, John Montgomery, in this his amended petition, by leave of
23 court, would respectfully make known that, on the 18th day of June, 1870, the above named John R. Stewart and William H.

Porter, composing the firm of Stewart, Porter and Co., were declared bankrupts by the district court of the United States for the western district of Missouri.

That afterwards, to wit, on the 19th day of July, 1870, your petitioner was duly elected assignee for said bankrupts, and on the 28th day of July, 1870, Milo Blair, esq'r, register in bankruptcy, by deed of assignment, duly acknowledged and delivered as the law directs, transferred and conveyed to your petitioner all and singular the estate and assets of the said bankrupts, whereby this complain't became and is the legal owner of the same, and has the right to sue and recover the same.

Plaintiff further states, that the defendant is a corporation, duly incorporated under the laws of the State of Ohio, and as such corporation is doing business in this State, and is subject to sue and be sued under the laws thereof.

Plaintiff further states that, prior to the adjudication of bankruptcy of the said Stewart, Porter & Co., they entered into a written contract with said defendants, to the effect following, to wit: That on the 14th day of , 1870, the said Stewart, Porter & Co. bought of the defendant, the Bucyrus Machine Works, one car-load of combined machines,
(droppers,) containing twenty machines, being reaping and
24 mowing machines, to be shipped not later than May 1st, 1870, and as much sooner as the said Stewart, Porter & Co. might request, said machines to be boxed in the customary manner of boxing harvesters, and delivered on board the cars in Bucyrus, Ohio, the said Stewart, Porter & Co. to pay one hundred and eighty-five dollars for each machine, less a discount of twenty-two per cent., and at the times as follows, to wit: One-half of the whole amount on or before October 1st, 1870, with interest from the 1st August, 1870, and the balance on the first day of January, 1871, with interest from the first day of August, 1870; and it was further agreed upon the part of the said Bucyrus Machine Works that they were to fill, as far as possible, all orders for machines sent to them by the said Stewart, Porter & Co. upon the same terms and conditions as above stated; and it was further agreed that if, at the end of the selling season in 1870, any of the machines so ordered should remain on hand unsold, the said Stewart, Porter & Co. were to take them and make payment therefor to the Bucyrus Machine Works as follows: One-half of the whole amount on the 1st day of October, 1871, with interest from August 1st, 1871, and the balance on the first day of January, 1872, with interest from the 1st of August, 1871.

It was further agreed in said contract that on all machines not sold
by Stewart, Porter & Co. in 1870, and held over, they, said Stew-
25 art, Porter & Co., were to be allowed any decline in price of said machines for the season of 1871.

Plaintiff further states, that said contract between the said Stewart, Porter & Co. and the defendant, the Bucyrus Machine Works, is now on file in the clerk's office of the clerk of the United States district court for the western district of Missouri, amongst the papers in the case of this plaintiff against the defendant herein pending in said court, and cannot be herein filed.

Plaintiff further states that afterwards, to wit, on the 2d day of April, 1870, the said Stewart, Porter & Co. ordered, under said contract, fifty combined reapers and mowers from said defendant, which were shipped to said Stewart, Porter & Co. by said defendant to Sedalia, Missouri, and were there received by them.

That afterwards, to wit, on the first day of May, 1870, the said Stewart, Porter & Co. sold eleven of said machines to Messrs. Brown, Clay

& Co., of Pleasant Hill, Cass County, Missouri, at the price and sum of one hundred and eighty-five dollars each, amounting to the sum of two thousand and thirty-five dollars; that at the said time said Stewart, Porter & Co. sold six of said machines to Case & Larkin, of Knob Noster, Johnson County, Mo., for the price and sum of one hundred and eighty-five dollars each, amounting to the sum of eleven hundred
26 and ten dollars; that on the 15th day of May, 1870, said Stewart, Porter & Co. sold one of said machines to Thomas Kirpatrick, of Warrensburg, Johnson County, Missouri, for the price and sum of one hundred and eighty-five dollars.

Plaintiff further states, that the said Stewart, Porter & Co., being bankrupt or insolvent, or in contemplation of bankruptcy and insolvency, within four months next before the filing of the petition for involuntary bankruptcy against them, and with the intent to give a preference to one of their creditors, to wit, the said Bucyrus Machine Works, directed and consented that the said Brown, Clay & Co., the said Case & Larkin, and the said Thomas Kirkpatrick should pay over to the defendant the price of said machines sold as aforesaid to them by said Stewart, Porter & Co.; and the plaintiff alleges the fact to be that said Brown, Clay & Co., and Case & Larkin, and Thomas Kirkpatrick did pay over to the said Bucyrus Machine Works the sums of money owing by them respectively to the said Stewart, Porter & Co., to wit, two thousand and thirty-five dollars, and eleven hundred and ten dollars, and one hundred and eighty-five dollars; the said defendant, the Bucyrus Machine Works, then and there having a reasonable cause to believe that a fraud on the bankrupt law was intended, and that said Stewart, Porter & Co. were insolvent.

Wherefore, by reason of the premises, the plaintiff is entitled
27 to recover of the defendant the sum of three thousand three hundred and thirty dollars, and for which said sum, with interest thereon, plaintiff asks judgment.

Plaintiff further states, the said Stewart, Porter & Co., some time in the month of May, 1870, sold to Thomas Kirkpatrick, of Warrensburg, Johnson County, Missouri, twenty-two combined reapers and mowers, at the price and sum of one hundred and eighty-five dollars each, amounting to the sum of four thousand and seventy dollars.

That in the month of May, 1870, the said Stewart, Porter & Co. sold to Messrs. Brown, Clay & Co., of Pleasant Hill, Cass County, Missouri, twenty-two combined reapers and mowers, at the price and sum of one hundred and eighty-five dollars each, amounting to the sum of four thousand and seventy dollars.

Plaintiff states that afterwards the said Stewart, Porter & Co. ordered forty-four combined machines from the said defendant, the Bucyrus Machine Works, under their contract aforesaid, and directed them to be shipped, twenty-two of them to the said Thomas Kirkpatrick, and twenty-two of them to the said Brown, Clay & Co., to thereby fill the sales made to them by the said Stewart, Porter & Co., and in pursuance of said order said machines were so shipped directly from Bucyrus, Ohio, and delivered to the said Thomas Kirkpatrick, at Warrensburg aforesaid, and to Brown, Clay & Co., at Pleasant Hill aforesaid, for and on account of the said Stewart, Porter & Co., and
28 in pursuance of the contract aforesaid between the said Stewart, Porter & Co. and the defendant.

Plaintiff further states, that the said Stewart, Porter & Co., being bankrupt and insolvent, or in contemplation of bankruptcy and insolvency, within four months next before the filing of the petition for invol-

untary bankruptcy against them, and with intent to give a preference to one of their creditors, to wit, the said Bucyrus Machine Works, directed and consented that the said Thomas Kirkpatrick and the said Brown, Clay & Co. should pay over to the defendant the price of said machines sold as aforesaid to them by said Stewart, Porter & Co.; and plaintiff alleges the fact to be that the said Brown, Clay & Co. did pay over to the said Bucyrus Machine Works the sum of money owing by them respectively to the said Stewart, Porter & Co., to wit, four thousand and seventy dollars each; the said defendant, the Bucyrus Machine Works, then and there having reasonable cause to believe that a fraud on the bankrupt law was intended, and that said Stewart, Porter & Co. were insolvent.

Wherefore, by reason of the premises, the plaintiff is entitled to recover of the defendant the sum of eight thousand one hundred and forty dollars, and for which, with interest thereon, the plaintiff asks judgment.

Plaintiff further states, that some time in the month of April, 1870, the said Stewart, Porter & Co. ordered twenty-five other ma-
29 chines—combined reapers and mowers—from the Bucyrus Machine Works, under the contract aforesaid, and ordered them to be shipped from Bucyrus, Ohio, a part to Messrs. Maury & Co., at St. Louis, Missouri, and a part to Messrs. Deere, Mansur & Co., at Kansas City, Missouri, and that said machines were shipped in pursuance of said order and said contract, as above stated, and received by said Maury & Co. and Deere, Mansur & Co. on account of the said Stewart, Porter & Co.; that afterwards said Stewart, Porter & Co., through and by their agents, Maury & Co., of St. Louis, and Deere, Mansur & Co., at Kansas City, sold and delivered said twenty-five machines to divers persons, to this plaintiff unknown, at the price and sum of one hundred and eighty-five dollars each, amounting to the sum of four thousand six hundred and twenty-five dollars.

Plaintiff further states, that the said Stewart, Porter & Co., being bankrupt and insolvent, or in contemplation of bankruptcy and insolvency, within four months next before the filing of the petition for involuntary bankruptcy against them, and with the intent to give a preference to one of their creditors, to wit, the said Bucyrus Machine Works, directed and consented that the said parties to whom said machines had been sold as aforesaid by said Stewart, Porter & Co. should pay over to the defendant, the Bucyrus Machine Works, the price of said machines,
30 instead of paying it to the said Stewart, Porter & Co.; and plaintiff alleges the fact to be that the said parties did pay over to the said Bucyrus Machine Works the said sum of money, to wit, the sum of $4,625, owing by them to the said Stewart, Porter & Co.; the said defendant, the Bucyrus Machine Works, then and there, having reasonable cause to believe that a fraud on the bankrupt law was intended, and that said Stewart, Porter & Co. were insolvent.

Wherefore, by reason of the premises, the plaintiff is entitled to recover of the defendant said sum of four thousand six hundred and twenty-five dollars, and for which, with interest, he asks judgment.

JOHN MONTGOMERY, JR.,
Assignee, &c.,
By PHILLIPS & VEST.
EWING & SMITH.

Filed Nov. 27, 1872.

A. S. KREKEL, *Clk.*

Defendant read his answer to plaintiff' amended petition, which is as follows, to wit:

Answer.

In the United States circuit court, western district of Missouri.

JOHN MONTGOMERY, JR., ASSIGNEE OF JOHN R. Stewart and William H. Porter, composing the firm of Stewart, Porter & Co., plff.,
31 *against*
BUCYRUS MACHINE WORKS, DEFT.

Defendant, for answer to plaintiff's amended petition, denies that the said firm of Stewart, Porter & Co., composed of the said John R. Stewart and Wm. H. Porter, on the 14th day of , or at any other time, entered into a written contract, mentioned and set out and described in plaintiff's amended petition, with this defendant; denies that the said Stewart, Porter & Co., composed as aforesaid, bought of this defendant one car-load, or any other number, of machines on the 14th day of , or at any other time, and denies that defendant was or agreed to fill all orders for machines sent defendant, or any orders sent defendant by said Stewart, Porter & Co., composed as aforesaid, as is set out and alleged in said amended petition.

Defendant denies that on the second day of April, 1870, or at any other time, the said Stewart, Porter & Co., composed as aforesaid, ordered, under the contract set out in plaintiff's amended petition, or any other contract, fifty combined mowers and reapers, or any other number, from defendant, and denies that said number, or any other number, were shipped to said Stewart, Porter & Co., composed as aforesaid, as is alleged in said amended petition.

32 Defendant, for further answer to the first count in said amended petition, denies that the said firm of Stewart, Porter & Co., composed as aforesaid, sold eleven of said machines to Brown, Clay & Co., or that said firm sold six of said machines to Case & Larkin, or that said firm sold one of said machines to Thomas Kirkpatrick, as is alleged in the first count of said amended petition.

Defendant denies that it was at any time the creditor of the said firm of Stewart, Porter & Co., composed of the said John R. Stewart and Wm. H. Porter. Defendant denies that the said firm of Stewart, Porter & Co., composed as aforesaid, with a view of giving a preference to defendant, directed or consented that the said Brown, Clay & Co., or the said Case & Larkin, or the said Thos. Kirkpatrick, should pay to defendant the price of said machines, so alleged to have been sold to them, or any other sum whatever, and denies that said Brown, Clay & Co., Case & Larkin, and Thos. Kirkpatrick did pay to defendant any money whatever except as hereinafter stated. Defendant denies that at the time of said alleged payments, or at the time of said alleged consent or direction by said firm of Stewart, Porter & Co., composed as aforesaid, the said Stewart, Porter & Co. were insolvent, and denies that defendant had reasonable cause to believe that a fraud on the bankrupt law was intended, and that said Stewart, Porter & Co. were insolvent.

33 Defendant, for further answer to the second count of plaintiff's amended petition, denies that said firm of Stewart, Porter & Co. sold twenty-two of said machines to the said Thos. Kirkpatrick, or that

said firm sold twenty-two of said machines to the said Brown, Clay & Co., or any other number, and denies that said firm of Stewart, Porter & Co. ordered twenty-two of said machines to be shipped to the said Thos. Kirkpatrick, or twenty-two of the same, or any other number, to the said Brown, Clay & Co., under the contract set out in said petition, or under any other contract except as hereinafter mentioned.

Defendant denies that it was ever, at any time, a creditor of the said firm of Stewart, Porter & Co., composed of the said John R. Stewart and Wm. H. Porter. Defendant denies that said firm, with the view of giving a preference to this defendant, or otherwise, directed or consented that the said Thos. Kirkpatrick or the said Brown, Clay & Co. should pay the price of said machines, or any other machines, to this defendant, or that they did so pay the price of said machines to this defendant, except as hereinafter stated. Defendant denies that at the time of said alleged direction or consent of said firm, or at the time of said alleged payment, the said Stewart, Porter & Co. were insolvent, or that the defendant had reasonable cause to believe said firm insolvent, or that a fraud on said bankrupt law was intended.

Defendant, for answer to the third count of said amended peti-
34 tion, denies that the said firm of Stewart, Porter & Co. ordered the said twenty-five machines, or any other number, from this defendant under the said alleged contract, to be shipped, a part to the said Maury & Co. and a part to the said Deere, Mansur & Co., and denies that said machines were so shipped in pursuance of said order or received by said Maury & Co. or Deere, Mansur & Co. on account of the said Stewart, Porter & Co. Defendant denies that said Stewart, Porter & Co., by their agents, Maury & Co. or Deere, Mansur & Co., or otherwise, sold said machines or any other machines, except as hereinafter mentioned. Defendant denies that this defendant was at any time a creditor of the said firm of Stewart, Porter & Co., composed of the said John R. Stewart and Wm. H. Porter; denies that said firm, with intent to give a preference to defendant, or otherwise, directed or consented that the said parties to whom said machines are alleged to have been sold should pay to the defendant the price of said machines, and denies that said parties did so pay over the price of said machines, except as hereinafter mentioned. Defendant denies that said Stewart, Porter & Co., at the time of said alleged direction and consent, or at the time of said alleged payment, were insolvent, and denies that this defendant had reasonable cause to believe the said firm insolvent, or that a fraud on the bankrupt law was intended.

35 And the said defendant, further answering, says, that prior to the 14th day of January, 1870, the said firm of Stewart, Porter & Co. were engaged in business as dealers in agricultural implements at Sedalia, in the county of Pettis, and State of Missouri; and this defendant was engaged in the business of manufacturing and selling agricultural implements in the city of Bucyrus, county of , and State of Ohio, a distance of about six hundred miles from the said city of Sedalia; that prior to this time neither this defendant nor its officers, agents, or stockholders had any dealings with nor any acquaintance with said firm of Stewart, Porter & Co., nor with any of the members thereof, nor had they any knowledge as to who were members or persons composing said firm; that on the said 14th day of January, 1870, the said firm of Stewart, Porter & Co., being desirous of purchasing combined mowers and reapers, sent their agent, one John A. Wallace, to the place of business of this defendant, at the city of Bucyrus, and State of Ohio, for the purpose of purchasing, and with authority to ne-

gotiate for and purchase, such machines (combined mowers and reapers for said firm from this defendant; that the defendant inquired of the) said John A. Wallace as to the condition and standing of said firm, and as to who were the members composing the same; that in reply to such inquiry the said Wallace thereupon stated to defendant that the said firm of Stewart, Porter & Co. was composed of the said John R.
36 Stewart, the said Wm. H. Porter, and him, the said John A. Wallace; that said firm was entirely solvent, in good credit, and engaged in a profitable business, and that the Wm. H. Porter, one of the members, was alone worth the sum of sixty thousand dollars; that the defendant, relying solely upon the representations of the said Wallace, and especially upon such representation that said firm of Stewart, Porter & Co. was composed of said Stewart, Porter, & Wallace, and upon the faith and belief that they were true, was induced thereby to enter into a written contract on the said 14th day of January, 1870, with the said firm of Stewart, Porter & Co., composed of said Stewart, Porter, & Wallace, whereby it sold to said firm, composed as last aforesaid, one car-load of twenty combined machines, at the price of one hundred and eighty-five dollars, less a discount of twenty-two per cent. for each machine; and further agreed to fill, as far as possible, all orders for machines sent to defendant by said firm of Stewart, Porter & Co., composed as last aforesaid, which said contract was signed and executed by the said Wallace for and in behalf of the said firm of Stewart, Porter & Co., composed of said Stewart, Porter & Wallace, and as a member of said firm, and as an agent of his copartners, the said John R. Stewart and Wm. H. Porter, which said contract is the same contract set out, mentioned, and described in plaintiff's amended petition as having been executed
37 on the said 14th day of 1870, and which is the only contract ever entered into by defendant with said firm of Stewart, Porter & Co., and which is now on file in the clerk's office of the clerk of this court, in a case of this plaintiff against the defendant, as is alleged in plaintiff's amended petition.

Defendant further states, that the said Wallace was permitted and authorized by the said John R. Stewart and Wm. H. Porter, and by the said firm of Stewart, Porter & Co., to make the representations aforesaid in the purchase of said machines, and to sign and execute said contract for said firm, and as a member thereof, and that the representations aforesaid were false and fraudulent, and known by said Wallace so to be at the time he made them, but that the knowledge that they were false and fraudulent did not come to defendant until after the said bankruptcy of said Stewart & Porter, and until after the payments to the defendant hereinafter mentioned.

Defendant admits that in the month of May, 1870, the said firm of Stewart, Porter & Co., composed of the said Stewart, Porter, & Wallace, sold to said Brown, Clay & Co. eleven combined mowers and reapers, and to said Case and Larkin six combined mowers and reapers, and to the said Thos. Kirkpatrick one combined mower and reaper, as alleged in the first count of said amended petition, purchased from defendant under the contract aforesaid, at and for the price and sum
38 of one hundred and eighty-five dollars each, less a discount of twenty-two per cent.; that the aggregate amount of said sale to said Brown, Clay & Co., after deducting the discount aforesaid, was the sum of one thousand five hundred and eighty-seven $\frac{30}{100}$ dollars, and that the amount last aforesaid was, by the direction and with the consent of the said firm of Stewart, Porter & Co., paid to this defendant; that the aggregate amount of said sale to said Case and Larkin was

eight hundred sixty-five $\frac{80}{100}$ dollars, and the amount of said sale to said Thos. Kirkpatrick was one hundred forty-four $\frac{30}{100}$ dollars, and the amounts last aforesaid were, by the direction and with the consent of said firm of Stewart, Porter, & Co., paid by said Case and Larkin and by the said Thos. Kirkpatrick to this defendant in payment for machines sold to the said Stewart, Porter & Co., composed as last aforesaid, by defendant under the contract aforesaid, and that the said sales to the said Brown, Clay Co., the said Case & Larkin, and the said Thomas Kirkpatrick last aforesaid are the same sales and payments set out and charged in the first count of said amended petition.

Defendant, further answering, admits that in the month of May, 1870, the said firm of Stewart, Porter & Co., composed of the said Stewart, Porter, & Wallace, under the said contract, ordered twenty-two of said machines shipped to said Kirkpatrick, and twenty-two of the
39 same to the said Brown, Clay & Co., and that the said machines were so shipped to said parties, as is alleged in the second count of said amended petition, at and for the price and sum of one hundred and eighty-five dollars each, less a discount of twenty-two per cent. Defendant admits that said twenty-two machines so shipped to said Brown, Clay & Co. were sold to said firm by said firm of Stewart, Porter & Co., so composed as last aforesaid, and the price of the same, amounting in the aggregate to the sum of three thousand one hundred and seventy-four $\frac{60}{100}$ dollars, were, with the consent and by direction of said Stewart, Porter & Co., paid to this defendant in payment of machines shipped by defendant to said Stewart, Porter & Wallace under the contract aforesaid. But the defendant avers that the said twenty-two machines so shipped to the said Thos. Kirkpatrick were not sold to him by the said Stewart, Porter & Co., but were held by him on commission, as the agent of said Stewart, Porter & Co.; that only six of said machines were sold by him; that ten of the same were, by directions of said Stewart, Porter & Co., shipped to said Brown, Clay & Co., and that seven of the same remained on hand and unsold at the date of said proceedings in bankruptcy; that the price of said six machines, less the discount of twenty-two per cent., amounted in the aggregate to the sum of eight hundred sixty-five $\frac{80}{100}$ dollars, which said sum
40 and no more was, by the direction and consent of said Stewart, Porter & Co., paid to defendant in payment of machines furnished to said Stewart, Porter & Co., composed of said Stewart, Porter, & Wallace, under the said contract entered into by defendant with said firm as aforesaid; which said sales last aforesaid to said Brown, Clay & Co. and the said Case & Larkin, and which payments last aforesaid by said parties to defendant, are the same sales and the same payments mentioned and set out in the second count of said amended petition.

Defendant, further answering, admits that in the month of April, 1870, the said Stewart, Porter, & Co., composed of said Stewart, Porter, & Wallace, ordered *ordered* twenty-two of said machines, under the said contract entered into with said firm as aforesaid, to be shipped from Bucyrus, Ohio, to Manny & Co., St. Louis, Missouri, and that said machines were shipped to and received by said Manny & Co. on account of the said Stewart, Porter & Co., but defendant avers the fact to be that the said Manny & Co. only sold six of said machines, amounting in the aggregate, after deducting the said discount of twenty-two per cent., to the sum of eight hundred sixty-five $\frac{80}{100}$ dollars, which said amount, within four months before the filing of said petition in bankruptcy, was, by direction and consent of the said Stewart, Porter & Co., paid to this defendant in payment of machines sold said Stewart, Porter

41 & Co., composed of said Stewart, Porter, & Wallace, under the said contract entered into with said firm by this defendant. Defendant further states that nine of said twenty-two machines were by said Manny & Co., as the agents of said Stewart, Porter & Co., shipped to various persons, and by said persons sold for a sum amounting in the aggregate, after deducting said discount of twenty-two per cent., to twelve hundred ninety-eight $\frac{70}{100}$ dollars, which said sum was, within four months before the filing of said petition in bankruptcy, by the direction and with the consent of said Stewart, Porter & Co., paid to this defendant in payment for machines furnished the said Stewart, Porter & Co., composed of said Stewart, Porter, & Wallace, under the said contract of defendant with that firm. Defendant further avers that five of said twenty-two machines so shipped to said Manny & Co. remained on hand and unsold at the time of the commencement of said proceedings in bankruptcy, and have since been delivered by said Manny & Co. to this defendant by and with the consent of the plaintiff.

Defendant, further answering, says that all of said machines, so sold to said Stewart, Porter, & Co., and so shipped on the order of said Stewart, Porter & Co., as hereinbefore stated, were sold and shipped under the said contract entered into with said Stewart, Porter & Co., composed of said Stewart, Porter, & Wallace, and were so shipped upon the

42 faith of said representations of the said Wallace that the said firm was composed of said Stewart, Porter, & Wallace, and would not have been shipped but for such representations; that the said firm of Stewart, Porter & Co., composed of John R. Stewart & Wm. H. Porter, never at any time entered into a contract with defendant for the purchase of machines, and never at any time purchased or ordered any machines from defendant, and was never at any time indebted to defendant for the purchase of machines; that defendant at all times dealt with the firm of Stewart, Porter & Co., as composed of said Stewart, Porter, & Wallace; that the said several sums paid to defendant, by direction and with the consent of said Stewart, Porter & Co., by said Brown, Clay & Co., Case & Larkin, Thos. Kirkpatrick, Manny & Co., and others, as hereinbefore set out, were paid on a debt due defendant from said firm of Stewart, Porter & Co., composed of said Stewart, Porter, & Wallace, for machines sold and furnished under said contract entered into by defendant with said firm. Defendant further states that, upon the faith of the said representations of the said Wallace, it, in selling and shipping said machines and in receiving the money from said parties, as hereinbefore stated, dealt with said Stewart, Porter & Co. as a firm composed of the said Stewart, Porter, & Wallace.

Defendant further alleges the fact to be that defendant had no knowledge or information that there was a firm of Stewart, Porter &

43 Co., composed of said John R. Stewart and Wm. Porter, until after the said adjudication in bankruptcy against said firm. Defendant further avers that the said firm of Stewart, Porter & Co., composed of the said Stewart, Porter, & Wallace, never, at any time, owed any debts, except to this defendant, for machines sold and delivered under the said contract so entered into by defendant with said firm as aforesaid, and that said firm has never at any time been declared or adjudged bankrupt, and that no petition or other proceedings in bankruptcy have ever been had or commenced against said firm. And defendant further avers that the assets of the estate of the said Stewart, Porter & Co., composed of John R. Stewart and Wm. H. Porter, will not pay more than five cents on the dollar; and that, if the plaintiff be permitted to recover the money sued for in this action, the defendant will be com-

pelled to share with the other creditors of said firm, and will receive only five cents on the dollar, and will thereby lose almost the entire debt due for machines so sold and delivered to said Stewart, Porter & Co., composed of said Stewart, Porter, & Wallace, upon the faith of the said representations of the said Wallace.

Defendant further states the fact to be that the said firm of Stewart, Porter & Co., composed of the said John R. Stewart and Wm. H.
44 Porter, never in fact had said machines so ordered and shipped as aforesaid in their possession, and never in fact had any *any* interest in the same, nor in the proceeds of the sale thereof; and that said firm never contracted any debts nor acquired any credit upon the faith that said machines or the proceeds of the sale thereof was the property of said firm. Defendant further states that the said John A. Wallace is wholly insolvent and has no property or effects whatever.

Wherefore, by reason of the premises, the defendant says that the plaintiff, as the assignee of the said John R. Stewart and Wm. H. Porter, composing the said firm of said Stewart, Porter & Co., ought not to be admitted to allege or prove that, in the purchase of said machines from this defendant under the contract aforesaid, and in the payment of the same, as hereinbefore set out, the said firm of Stewart, Porter & Co. was not composed in fact of the said John R. Stewart, Wm. H. Porter, and John A. Wallace, and ought not to be admitted to allege or prove that the said representations of the said Wallace, upon the faith of which representations the defendant was induced to act and has acted, as hereinbefore set out, are untrue, and ought not to have and maintain his action for the recovery of the money so paid defendant, as hereinbefore set out, and for the recovery of which this action is brought.

45 And the defendant hereof prays judgment and for costs.

THE BUCYRUS MACHINE WORKS,

By LAY & BELCH, *its Attorneys.*

(Endorsed:) Filed Feb'y 4, 1873. Alfred S. Krekel, clk.

Plaintiff read his replication to amended answer, which is as follows, to wit:

Reply.

United States circuit court, western district of Missouri.

JNO. MONTGOMERY, ASSIGNEE STEWART, Porter & Co., plffs., *against* BUCYRUS MACHINE WORKS, DEFT.

And now comes the plaintiff, and for replication to the amended answer of the defendant, made by interlineation, denies that the representations of the said John. A. Wallace, as alleged by the defendant, were fraudulent. Plaintiff admits that it was not true that Porter was at the time worth sixty thousand dollars, as alleged and represented by said Wallace, but he denies that Wallace knew it at the time; denies that Wallace at the time knew that Stewart, Porter & Co. were insolvent.

Plaintiff alleges the fact to be that the defendant knew Stewart, Porter & Co. were insolvent before they were declared bankrupt, and
46 before the petition to have them declared bankrupt was filed.

Plaintiff further alleges the fact to be that the defendant knew that Stewart, Porter & Co. were insolvent, and they knew that the representations of Wallace, as to the worth of Porter, or of Stewart, Porter & Co's. solvency were untrue before the payments were made to them, as alleged in plaintiff's petition, by the different parties for machines.

EWING & SMITH,
For Plaintiff.

(Endorsed:) Filed Nov. 19, 1873. M. M. Price, clerk.

Plaintiff and defendant filed the following stipulation waiving a jury:

Waiver of jury trial.

In the circuit court of United States for the western district of Missouri.

JOHN MONTGOMERY, JR., ASSIGNEE OF Stewart, Porter & Co.,
vs.
THE BUCYRUS MACHINE WORKS.

In the above cause we waive a trial by a jury.

EWING & SMITH, *for Plff.*
LAY & BELCH,
Attys. for Defendant.

(Endorsed:) Filed Nov. 19, 1873. M. M. Price, clerk.

47 By agreement the following statement of facts was submitted to the court as the evidence in the case, as follows, to wit:

Statement of facts.

In the circuit court of the United States, western district of Missouri.

JOHN MONTGOMERY, ASSIGNEE OF JOHN R. Stewart and William H. Porter, composing the firm of Stewart, Porter & Co., bankrupts,
vs.
THE BUCYRUS MACHINE WORKS.

In order to avoid the trouble and expense of making proof of the same, the following facts are admitted by the parties to be true, and are to be taken and considered as if offered in evidence upon the trial and hearing of this cause, subject only to objection as to their competency or relevancy as evidence in said cause, that is to say: That John R. Stewart and Wm. H. Porter, composing the firm of Stewart, Porter & Co., were declared bankrupt on the 18th day of June, 1870, upon a petition filed for that purpose on the day of , 1870; that the plaintiff was duly elected assignee, and his election approved by the court, and that the effects and assets of said bankrupts were duly assigned to said assignee, as required by law; that the defendant is a corporation incorporated under the laws of the State of Ohio, and doing business
48 in this State; that the defendant did not enter into any contract with the firm of Stewart, Porter & Co., composed of John

R. Stewart and Wm. H. Porter, but that John A. Wallace, acting as the agent of Stewart, Porter & Co., went to Bucyrus, Ohio, and represented himself as a member of the firm of Stewart, Porter & Co., and that said firm was composed of John R. Stewart, Wm. H. Porter, and himself, (as set out in that portion of defendant's answer hereinafter referred to,) and that defendant did, on the 14th day of January, 1870, enter into a contract, as set out in plaintiff's amended petition, with the firm of Stewart, Porter & Co., composed of Stewart, Porter, & Wallace; that the firm of Stewart, Porter & Co. sold to Brown, Clay & Co. eleven machines, to Case & Larkins six machines, and to Thos. Kirkpatrick one machine, at the price of $185.00 each, less twenty-two per cent. discount, and that after deducting said discount the aggregate price of said machines was $2,597.40, and that said sum was paid over to defendant by said Brown, Clay & Co., Case & Larkins, and said Thos. Kirkpatrick, by the direction and with the consent of said Stewart, Porter & Co., within four months of the filing of the petition in bankruptcy against said firm of Stewart, Porter & Co.; that twenty-two other machines were shipped by defendant from Bucyrus, Ohio, to Brown, Clay & Co., under the contract, upon the order of the firm of Stewart, Porter & Co., and at the prices aforesaid, which amounted to the
49 sum of $3,174$\frac{60}{100}$, and that said sum was paid to defendant by said Brown, Clay & Co., by the direction of said Stewart, Porter & Co., within four months before the filing of said petition against said parties; that twenty-two other machines were shipped by defendants, upon the order of said Stewart, Porter & Co., under said contract, to Thos. Kirkpatrick, and at the prices aforesaid, and that the price of six of said machines, to wit, the sum of 865\frac{80}{100}$, was, by directions and with the consent of Stewart, Porter & Co., paid to defendant within four months before the filing of said petition in bankruptcy against said parties; that twenty other machines were shipped by defendant from Bucyrus, Ohio, upon the order of Stewart, Porter & Co., under said contract, to Manny & Co., at St. Louis, Missouri, at the prices aforesaid; that fifteen of said machines were sold, and that price, amounting to the sum of $2,164.50, was paid to defendant, by direction and with the consent of Stewart, Porter & Co., within four months of the filing of said petition against said bankrupts; and that said Manny & Co., with the consent of said Stewart, Porter & Co., redelivered to defendant five of said machines within four months as aforesaid; that the whole amount so paid for to defendant, not including the five machines returned was $8,802.30.

It is further admitted that the matters and facts set out and alleged in that portion of defendant's answer to plaintiff's amended peti-
50 tion in this cause hereinafter mentioned are true, except as hereinafter agreed and stated; said portion of said answer being in words and figures as follows, viz:

"And the said defendant, further answering, says, that prior to the 14th day of January, 1870, the said firm of Stewart, Porter & Co. were engaged in business as dealers in agricultural implements at Sedalia, in the county of Pettis, and State of Missouri, and this defendant was engaged in the business of manufacturing and selling agricultural implements at the city of Bucyrus, in the county of Crawford, and State of Ohio, a distance of about six hundred miles from the said city of Sedalia; that prior to this time neither this defendant nor its officers, agents, or stockholders had any dealings with nor any acquaintance with said Stewart, Porter & Co., nor with any of the members thereof, nor had any knowledge as to who were members or persons composing

the same; that on the 14th day of January, 1870, the said firm of Stewart, Porter & Co., being desirous of buying combined mowers and reapers, sent their agent, one John A. Wallace, to the place of business of this defendant, at the city of Bucyrus, and State of Ohio, for the purpose of purchasing, and with authority to negotiate for the purchase of, such machines (combined mowers and reapers) for said firm from this defendant; that the defendant inquired of the said John A. Wallace as
51 to the condition and standing of said firm, and as to who were the members composing the same; that in reply to such inquiry the said Wallace thereupon stated to defendant that the said firm of Stewart, Porter & Co. was composed of the said John R. Stewart, Wm. H. Porter, and himself, the said John A. Wallace; that said firm was entirely solvent, in good credit, and engaged in profitable business, and that the said Wm. H. Porter, one of its members, was alone worth the sum of $60,000.00; that this defendant, relying solely upon the said representations of the said Wallace, and especially upon such representation that said firm of Stewart, Porter & Co. was composed of Stewart, Porter, & Wallace, and upon the faith and belief that they were true, was induced thereby to enter into a written contract on the 14th day of January, 1870, with the said firm of Stewart, Porter & Co., composed of Stewart, Porter, & Wallace, whereby it sold to said firm, composed as last aforesaid, one car-load of twenty combined machines, at the price of $185.00 each, less a discount of twenty-two per cent., and further agreed to fill, as far as possible, all orders for machines sent to defendant by said firm of Stewart, Porter & Co., composed as last aforesaid, which said contract was signed and executed by said Wallace for and in behalf of said firm of Stewart, Porter & Co., composed of Stewart, Porter,
52 & Wallace, and as a member *member* of said firm, and as an agent of his copartners, John R. Stewart and Wm. H. Porter; which said contract is the same contract set out, mentioned, and described in plaintiff's amended petition as having been executed on the said 14th day of January, 1870, and which is the only contract ever entered into by defendant with said firm of Stewart, Porter & Co., and which is now on file in the clerk's office of the clerk of this court, in a case of this plaintiff against the defendant, as is alleged in plaintiff's amended petition.

"Defendant further states, that said Wallace was permitted and authorized by said John R. Stewart and Wm. H. Porter, and by said firm of Stewart, Porter & Co., to execute said contract for said firm, and as a member thereof, and to make the representations as to who composed the said firm.

"Defendant admits that in the month of May, 1870, the said firm of Stewart, Porter & Co., composed of said Stewart, Porter, & Wallace, sold to the said Brown, Clay & Co. eleven combined mowers and reapers, and to the said Case & Larkins six combined mowers and reapers, and to the said Thos. Kirkpatrick one combined mower and reaper, as alleged in the first count of said amended petition, purchased from defendant under the contract aforesaid, at and for the price and sum of $185.00 each, less twenty-two per cent. discount; that the aggregate amount of said sale to said
53 Brown, Clay & Co., after deducting the discount aforesaid, was the sum of $1,587.30, and that the amount last aforesaid was, by the direction and with the consent of the said Stewart, Porter & Co., paid to this defendant; that the aggregate amount of the said sale to Case & Larkins was $865.80, and the amount of sale to said Thos. Kirkpatrick was $144.30, and that the amounts last aforesaid were, by the direction and with the consent of said Stewart, Porter & Co., paid

by said Case & Larkins and by said Thos. Kirkpatrick to this defendant, in payment for machines sold to the said Stewart, Porter & Co., composed as last aforesaid, by the defendant, under the contract aforesaid; and that the said sales to the said Brown, Clay & Co., to the said Case & Larkins, and the said Thos. Kirkpatrick are the same sales and payments set out and charged in the first count of said amended petition.

"Defendant, further answering, admits that in the month of May, 1870, the said firm of Stewart, Porter & Co., composed of said Stewart, Porter, & Wallace, under the said contract, ordered twenty-two of said machines shipped to said Kirkpatrick, and twenty-two of the same to the said Brown, Clay & Co., and that the said machines were so shipped to said parties, as is alleged in the second count of said amended petition, at and for the price of $185.00 each, less a discount of twenty-two per cent.

54 Defendant admits that said twenty-two machines so shipped to said Brown, Clay & Co. were sold to said firm by said firm of Stewart, Porter & Co., composed as last aforesaid, and the price of the same, amounting in the aggregate to the sum of $3,174.60, was, with the consent and by direction of said Stewart, Porter & Co., paid to this defendant in payment of machines shipped by defendant to said Stewart, Porter & Co. under the contract aforesaid. But defendant avers that the said twenty-two machines so shipped to the said Thos. Kirkpatrick were not sold to him by said Stewart, Porter & Co., but were held by him on commission, as the agent of said Stewart, Porter & Co.; that only six of said machines were sold by him; that ten of the same were, by direction of said Stewart, Porter & Co., shipped to said Brown, Clay & Co., and seven of the same remained on hand and unsold at the date of the commencement of said proceedings in bankruptcy; that the price of said six machines, less a discount of twenty-two per cent., amounted in the aggregate to the sum of $865.80, which said sum and no more was, by direction and consent of said Stewart, Porter & Co., paid to defendants in payment of machines furnished said Stewart, Porter & Co., composed of said Stewart, Porter, & Wallace, under said contract entered into by defendant with said firm as aforesaid, which sales last aforesaid to said Brown, Clay & Co. and Case &

55 Larkins, and which said payments last aforesaid by said parties to defendant, are the same sales and the same payments mentioned and set out in the second count of said amended petition.

"Defendant, further answering, admits that in the month of April, 1870, the said Stewart, Porter & Co., composed of said Stewart, Porter, & Wallace, ordered twenty-two of said machines, under the said contract, entered into with the said firm as aforesaid, to be shipped from Bucyrus, Ohio, to Manny & Co., St. Louis, Missouri, and that said machines were shipped to and received by said Manny & Co. on account of said Stewart, Porter & Co.; but defendant avers the fact to be that the said Manny & Co. only sold six of said machines, amounting in the aggregate, after deducting a discount of twenty-two per cent., to the sum of $865.80, which said amount, within four months before the filing of said petition in bankruptcy, was, by the direction and consent of said Stewart, Porter & Co., paid to this defendant in payment of machines sold to Stewart, Porter & Co., composed of said Stewart, Porter, & Wallace, under the said contract entered into with said firm by this defendant. Defendant further states, that nine of said machines were by said Manny & Co., as the agents of Stewart, Porter & Co., shipped to various persons, and by said persons sold for a sum amount-

56 ing in the aggregate, after deducting said discount of twenty-two per cent., to $1,298.70, which said sum was, within four months

before the filing of said petition in bankruptcy, by direction and with the consent of said Stewart, Porter & Co., paid to this defendant in payment of machines furnished the said Stewart, Porter & Co., composed of the said Stewart, Porter & Wallace, under the said contract of defendant with that firm. Defendant further avers that five of said twenty-two machines so shipped to said Manny & Co. remained on hand and unsold at the time of the commencement of said proceedings in bankruptcy, and have since been delivered to this defendant by and with the consent of the plaintiff.

"Defendant, further answering, says, that all the machines so sold to the said Stewart, Porter & Co., and so shipped on the order of said Stewart, Porter & Co., as hereinbefore stated, were so sold and shipped under the said contract entered into with said Stewart, Porter & Co., composed of said Stewart, Porter & Wallace, and were so sold and shipped upon the faith of said representations of said Wallace; that said firm was composed of said Stewart, Porter & Wallace, and would not have been shipped but for such representations; that said firm of Stewart, Porter & Co., composed of John R. Stewart and Wm. H. Porter, never at any time entered into a contract with defendant for the purchase of machines, and never at any time purchased or ordered
57 any machines from defendant, and was never at any time indebted to defendant for the purchase of machines, except as hereinbefore stated; that the said several sums paid to defendant, by direction and with the consent of said Stewart, Porter & Co., by said Brown, Clay & Co., Case & Larkins, Thos. Kirkpatrick, Manny & Co., and others, as hereinbefore set out, were paid on a debt due defendant from said firm of Stewart, Porter & Co., composed of said Stewart, Porter, and Wallace, for machines sold and furnished under said contract entered into by defendant with said firm. Defendant further states that, upon the faith of the said representations of the said Wallace, it, in selling and shipping said machines and in receiving the money from said parties, as hereinbefore stated, dealt with said Stewart, Porter & Co., as a firm composed of Stewart, Porter & Wallace. Defendant further alleges the fact to be that defendant had no knowledge or information that there was a firm of Stewart, Porter & Co., composed of John R. Stewart and William H. Porter, until after the said adjudication in bankruptcy against said firm. Defendant further avers that the said firm of Stewart, Porter & Co., composed of Stewart, Porter, & Wallace, never at any time owed any debts, except to this defendant, for machines sold and delivered, under the said contract so entered into by this defendant with said firm as aforesaid, and that
58 said firm has never, at any time, been declared or adjudged bankrupt, and that no petition or other proceedings in bankruptcy have ever been had or commenced against said firm. And defendant further avers that the assets of the estate of the said Stewart, Porter & Co., composed of the said John R. Stewart and Wm. H. Porter, will not pay more than five cents on the dollar, and that if the plaintiff be permitted to recover the money sued for in this action, the defendant will be compelled to share with the other creditors of said firm, and will receive only five cents on the dollar, and thereby lose the entire debt due for machines so sold and delivered to Stewart, Porter & Co., composed of said Stewart, Porter, and Wallace, upon the faith of said representations of the said Wallace. Defendant further states that the said Wallace is wholly insolvent and has no property whatever."

The exception as to the matters and facts set out in said portion of answer hereinbefore referred to is as to one point only, viz, as to who

composed in fact the said firm of Stewart, Porter & Co., and as to this point we agree as follows, viz: that said firm was formed about the first of January, 1870, and, by the terms of the original agreement, was composed of the said John R. Stewart and Wm. H. Porter, it being at the time of its formation left optional with the said John A. Wallace to become a member of the firm or not, and the "Co." being added to
59 the firm name in order to include said Wallace if he chose to come in; that with this understanding and with authority from said Stewart & Porter to act and contract for machines, either as their agent or as a member of the firm, he went on to Bucyrus, Ohio, and made the representations and entered into the contract set out in plaintiff's amended petition; that after making said contract he returned from Ohio, and travelled for some time trying to sell machines for Stewart, Porter, and himself, under the contract he had made, and that, not meeting with the success he expected, he then, before the delivery of said machines to Brown, Clay & Co., Case & Larkins, Thos. Kirkpatrick, and Manry & Co., notified Stewart & Porter that he would not become a member of said firm, and was not in fact considered a member of said firm by either Stewart, Porter, or himself; but that defendant had no notice that he was not a member until after the bankruptcy of the said Stewart & Porter, and in all its dealings with said firm, defendant dealt with it as a firm composed of the said Stewart, Porter, & Wallace.

It is further agreed that the papers, depositions, letters, and exhibits heretofore used in evidence and now on file in the case of this plaintiff against Deere, Mansur & Co., and the Bucyrus Machine Works, and in case of this plaintiff against the defendant, on objection to allow-
60 ance of claim in the United States distr. court for the west. distr. of Missouri, may be used by either party in evidence upon the trial or hearing of this cause, and not inconsistent with the facts hereinbefore agreed to, and subject to objection to their competency as evidence.

EWING & SMITH,
Attys. for Plff.
LAY & BELCH,
Attys. for Defendant.

(Endorsed:) Filed April 4, 1873. Alfred S. Krekel, clerk.

EXHIBIT B.

United States cir. court, western district of Missouri.

JOHN MONTGOMERY, ASSIGNEE STEWART, PORTER & Co., plff.,
against
BUCYRUS MACHINE WORKS, deft.

It is stipulated that the payments (for whatever machines were paid for by Brown, Clay & Co., Case & Larkins, Thomas Kirkpatrick, and others, to the defendant) were made on the fifth of June, 1870. It is further admitted that the representations of the said Wallace to defendant, at the time of entering into the contract for the purchase of machines, as to the solvency of the firm of Stewart, Porter & Co.,
61 and as to the value of the property owned by the said Porter, were untrue, and that said Wallace at the time that said Porter was not worth sixty thousand dollars.

And it is further agreed that said Stewart & Porter did not authorize Wallace to state to the defendant that Porter was worth sixty thousand dollars, nor to make any other false statements or representations.

And it is further admitted that the said Stewart, Porter, and Wallace are each individually insolvent, and that the firm of Stewart, Porter & Co., composed of John R. Stewart and William H. Porter, is insolvent, and that such insolvency existed at the date of such payments to defendant.

EWING & SMITH,
PHILLIPS & VEST,
For Plff.
LAY & BELCH,
For Defendant.

(Endorsed:) Filed Nov. 14, 1873. M. M. Price, clerk.

EXHIBIT C.

J. F. JENKINS, being sworn, testified as follows:

In the fall of 1866 I went to Sedalia, and went into the business of selling agricultural machines in partnership with my brother-in-law, John R. Stewart, one of the bankrupts in this case. I left there
62 in January or February, 1870, and Stewart then went into partnership with Wm. H. Porter. I afterwards acted as an agent for them in selling Bucyrus reapers and mowers. I was anxious to secure the general agency from the Bucyrus Works to sell their machines, and Stewart permitted me make sales of machines, for the purchase of which Stewart, Porter & Co. were responsible.

I made my first trip to Bucyrus, and wanted to get my commissions increased, and was to sell machines for them, but they held Stewart, Porter & Co. responsible for all machines sold or contracted to be sold by me.

I told the officers of the Bucyrus Works that Stewart, Porter & Co. were getting along very well.

I then returned to Sedalia, and had a conversation with Stewart in relation to a contract they had made for the sale of some machines with Deere, Mansur & Co., at Kansas City. In that conversation he said he could not meet his paper as it matured; said he had made an unfortunate venture in Texas; that if he had further time he might be able to meet his maturing paper, and said he didn't know but what he would have to call a meeting of his creditors. This was about the first week in May, 1870. I was then acting as the agent of the Bucyrus Works for sale of machines. This conversation was in relation to
63 a change of the contract between Stewart, Porter & Co. with Deere, Mansur & Co., and it was changed to a contract between Deere, Mansur & Co. & the Bucyrus Machine Works in the place of Stewart, Porter & Co.

I afterwards went back to Bucyrus and told them I had changed this contract. This was in May, 1870. I did not give them any other reason for making this change than that Stewart, Porter & Co. were "shaky," and the works approved of my action in making the change. I talked to the secretary, Mr. Ruhl, about it. I was on good terms with him. I told Mr. Ruhl that Stewart, Porter & Co. were "hard up." He asked me concerning the financial condition of Stewart, Porter & Co. I told him of the conversation I had had with Stewart, and what he said about the Texas matter. I was acquainted with the fact that Stewart,

Porter & Co. were hard up; knew that some parties had taken goods for their debts. They had stopped payment on all their paper for several weeks before the petition was filed against them to have them declared bankrupt. I told the defendant that Stewart, Porter & Co. were in failing circumstances, and that their paper had gone to protest.

64 We agree that the foregoing statement is in substance what J. F. Jenkins would have testified to as a witness, and that the same may be read in evidence at the trial of the cause, provided said Jenkins is not present at such trial; but should said Jenkins be present, it is not to be used for any purpose whatever as evidence in the trial of said cause.

LAY & BELCH,
Attorneys for Bucyrus Machine Works.
EWING & SMITH,
For Plaintiff.

EXHIBIT D.

BUCYRUS, O., *January* 14, 1870.

This memorandum is such that Messrs. Stewart, Porter & Co., of Sedalia, Missouri, have this day bought of the Bucyrus Machine Works, of Bucyrus, Ohio, one car-load (20) combined (droppers) machines, to be shipped not later than May 1, 1870, and as much sooner as the said Stewart, Porter & Co. may request; said machines to be boxed in the customary *in the customary* manner of boxing harvesters, and delivered on board the cars in Bucyrus, Ohio. The said Stewart, Porter & Co. are to pay one hundred & eighty-five (185) dollars for each machine, less a discount of 22 %, (per cent.,) and at the times following, to wit:
65 One-half of the whole amount on or before October 1, 1870, with interest from August 1, 1870, and the balance on the 1st day of January, 1871, with interest from the 1st day of August, 1870. And it is further agreed upon the part of the Bucyrus Machine Works, that they are to fill, as far as possible, all orders for machines sent them by the said Stewart, Porter & Co. upon the same terms and conditions as above stated, and such machines so ordered as aforesaid, and remaining on hand and unused at the close of the selling season in 1870, the said Stewart, Porter & Co. agree to take them on their own account, and make payment for the same to the Bucyrus Machine Works as follows, to wit: One-half of the whole amount on the 1st day of October, 1871, with interest from August 1, 1871, and the balance on the 1st day of January, 1872, with interest from the 1st day of August, 1871. The said Stewart, Porter & Co. are to sell in the following territory, to wit: Cass, Saline, Lafayette, Cooper, Henry, Benton, Johnson and Jackson Counties, in Missouri; also Southwest Missouri.

Witness our hands on the day and year first above written.

A. A. RUHL,
Sec'y Bucyrus Machine Works.
STEWART, PORTER & COMPANY.

[5 c. rev. stamp.]

66 SEDALIA, MO., *June* 12, '70.

FRIEND LEWIS: After kind regards, I take the priv'lage of informing you that report yesterd'y th't Stu'rt & Porter had failed. Thinking that it might be to your advant'ge to know as soon as pos'ible will account for my writ'ng. I hope you will not let any one know that I

have wrote to you ab't thare failur', as I have no dispes'tion to inturfeer with any one's bus'ness, as I have all I can due to take care of my own; but if I recol'ect right in you asked me in one of your letters ab't thare standing, and I wrote to you that I did not think you wo'ld have any troubel do'g business with ther this year. But it has *has* turned out otherwise. There will be some wh't cut this week; the crop will be light; corn is good.

We are well. I will *I will* direct this letter to Mr. Ruell. If I have done 'rong in writing to you as I have, you will excuse me, as I have done thinking it was my duty under the circumst'ces.

Pleas' answer.

Y'rs, truly,

JOHN S. WOOD.

Upon these statements (Exhibits A, B. C, & D) the case was submitted to the court, sitting as a jury, and the court declared the law, as follows:

67 *The law.*

MONTGOMERY, ASSIGNEE, &C.,
vs.
BUCYRUS MACHINE WORKS.

I. That the firm of Stewart, Porter & Co., having been formed by Stewart & Porter, under the style of Stewart, Porter & Co., with a view that Wallace might become a member of it if he should so elect, and as Wallace was expressly authorized by Stewart & Porter to go to Bucyrus and purchase of the defendants machines manufactured by them, as a partner in the firm of Stewart, Porter & Co., and as Wallace did represent to the defendant that he was thus a partner in the firm, and that it was composed of Stewart, Porter, and himself, and as the defendant relied upon his representations, and parted with their machines on the faith thereof, and as the defendants had no notice that Wallace was not a partner, or that he had, after the machines had been delivered, as between himself and Stewart & Porter, concluded not to become a partner until after the bankruptcy of Stewart & Porter, the three, Stewart, Porter, & Wallace, as respects the defendants, are to be considered as copartners, and bound to the defendants accordingly.

II. That as the defendants were induced to part with their ma-
68 chines, as above stated, by the representations of Wallace as who composed the firm, and by his false and fraudulent representations as to the solvency of the firm and the pecuniary ability of Porter, and as the machines did not lose their identity, or compose part of the permanent stock of goods of the bankrupts, in such a manner that they can be considered as having obtained credit by means thereof, and as the bankrupts and Wallace, before the bankruptcy, recognized the equities of the defendants, arising out of the circumstances under which the machines were obtained, to have the machines returned or to collect the proceeds of the sales thereof, and settled and arranged with the defendants accordingly, the court is of opinion that this arrangement is, under the circumstances, binding in law and equity upon the parties to it, viz, Stewart, Porter, and Wallace, on the one side, and the defendants on the other; and, in the absence of fraud in fact in the making of said arrangement and settlement, it would be binding upon the creditors of Stewart & Porter, and is not rendered fraudulent under the bankrupt

act by the mere circumstance that when it was made the defendants knew that Stewart & Porter, two of their creditors, were insolvent.

JOHN F. DILLON, *Judge.*

69 The court found for the defendant, and entered judgment as follows, to wit:

Judgment.

JOHN MONTGOMERY, JR., ASSIGNEE OF STEWART & Porter, bankrupts.
vs.
THE BUCYRUS MACHINE WORKS.

Now come the said parties, by their respective attorneys, the plaintiff by Ewing & Smith, and the defendant by Lay & Belch, and this cause having heretofore been submitted to the court upon the pleadings and evidence herein, and all and singular the matters and things herein being seen and heard, and by the court fully understood, the court doth find the issues for the defendant.

It is therefore considered, ordered, and adjudged by the court that the plaintiff take nothing by his writ herein; that the defendant go hence without day, and have and recover of the said plaintiff its costs and charges herein laid out and expended, and have thereof execution.

The plaintiff filed his motion to set aside the verdict, finding, and judgment, and for a new trial; which said motion is as follows, to wit:

Motion for new trial.

Circuit court of the United States, western dist. Mo., April, 1874.

JOHN MONTGOMERY, JR., ASSN.
70 Stewart, Porter & Co., plff.,
v.
BUCYRUS MACHINE WORKS, DEFT.

Plaintiff, by his attys., Ewing & Smith, move the court to set aside the verdict and grant a new trial in this case—

1. Because the verdict and judgment is against the evidence and the law.
2. The law, upon the facts presented, will not support the judgment.
3. The court erred in its instructions.

EWING & SMITH,
For Plaintiff.

Which being overruled, the plaintiff at the time objected and excepted. The plaintiff then filed his assignment of errors as follows, to wit:

Assignment of errors.

Circuit court United States, Jefferson City, Mo., Ap'l, 1874.

JOHN MONTGOMERY, JR., ASSIGNEE OF STEWART, Porter & Co., plff.,
against
BUCYRUS MACHINE WORKS, DEFT.

And now comes the plaintiff, by his attorneys, Ewing & Smith, and assigns error as follows:

71 1. The circuit court erred in finding for the defendant upon the facts in evidence and the law.

2. The law will not warrant a judgment upon the facts as proven.
3. The court erroniously declared the law.

EWING & SMITH,
For Plaintiff.

And prayed that the court sign and seal this his bill of exceptions and make the same a part of the record, which is done accordingly.

JOHN F. DILLON,
Circuit Judge.

(Endorsed:) Filed April 24, 1874. M. M. Price, clerk.

And afterwards, to wit, at the said April term, 1874, and on the 28th day of said month, the following appears of record in said cause.

JOHN MONTGOMERY, JR., ASSIGNEE OF STEWART, PORTER & CO.,
vs.
BUCYRUS MACHINE WORKS.

Now comes the plaintiff, by his attornevs, Phillips & Vest and Ewing & Smith, and files herein his bond, in the sum of five hundred
72 dollars, which is by the court approved; which said bond is in words and figures as follows, to wit:

Bond.

Know all men by these presents, that we, John Montgomery, assignee of Stewart, Porter & Co., as principal, and John Montgomery, jr., and John C. Thompson as security, are held and firmly bound unto the Bucyrus Machine Works in the full and just sum of five hundred dollars, to be paid to the said Bucyrus Machine Works, heirs, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents, sealed with our seals, and dated this 27th day of April, in the year of our Lord one thousand eight hundred and seventy-four.

Whereas lately, at the April term, 1874, of the circuit court of the U. S. for the western district of Missouri, in a suit depending in said court between John Montgomery, jr., assignee of Stewart, Porter & Co., as plaintiff, and the Bucyrus Machine Works, judgment was rendered against the said plaintiff, and the said plaintiff having obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Bucyrus Machine Works, citing and
73 admonishing it to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said plaintiff shall prosecute said writ to effect, and answer all damages and costs if he fail to make good his plea, then the above obligation to be void; else to remain in full force and virtue.

JOHN MONTGOMERY, JR., [SEAL.]
Assignee Stewart, Porter & Co.
JOHN MONTGOMERY, JR., [SEAL.]
J. C. THOMPSON. [SEAL.]

Approved by—

JOHN F. DILLON, *Judge.*

THE UNITED STATES OF AMERICA,
Western District of Missouri, ss:

I, M. M. Price, clerk of the circuit court of the United States in and for the western district of Missouri, do hereby certify that the above and foregoing is a true, full, and complete transcript of the record and proceedings had in the above-entitled cause as fully as the same appear in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at office in the city of Jefferson, this 7th day of May, A. D. 1874.

74 [SEAL.]

M. M. PRICE, *Clerk.*
By C. M. WARD, *Deputy.*

(Indorsement on cover:) No. 184. John Montgomery jr., assignee of Stewart, Porter & Co., plaintiffs in error, vs. Bucyrus Machine Works. W. Missouri C. C. U. S. Filed 1st June, 1874.

SUPREME COURT UNITED STATES.

CASE NO. 184.

Jno. Montgomery, Assignee of Stewart, Porter & Co.	Plaintiff in Error.
vs.	
Bucyrus Machine Works.	Defendant in Error.

In Error to the Circuit Court of the United States for the Western District of Missouri.

STATEMENT AND BRIEF FOR PLAINTIFF IN ERROR BY JAMES BAKER AND EWING & SMITH.

This is a suit under the thirty-fifth section of the bankrupt act, to recover money paid to defendant, by the consent of the bankrupts, within the four months limitation.

I. The petition alleges and defendant admits the purchase of machines under the contract sued on.

II. That the bankrupts after the purchase of said machines sold them to various parties mentioned in the petition.

III. That *within the four months, with the consent of the bankrupts*, the parties who owed the bankrupts for said machines paid for them *to the defendants.*

IV. That the amount so paid altogether, was $8,802.30. [See page 20 of record.] So far everything is admitted.

V. At the time of said payment, or at the time the bankrupts

consented to said payment, did *defendants* have reasonable cause to believe Stewert & Porter were insolvent, etc.?

This question is very readily solved by the evidence in the case, and is the *only* question of *fact* not already admitted.

I. It is admitted that Stewart, Porter & Co. were *insolvent* at the time the money was paid. [See record, p. 24.]

II. It is admitted that Wallace is insolvent. [See record, p. 23.]

III. It is admitted that the firm of Stewart, Porter & Co., in fact, was composed of Jno. R. Stewart and Wm. H. Porter, and Wallace was not in it. [See record, p. 23.]

IV. That said firm so composed was declared bankrupt June 18, 1870. [Record, p. 19.]

V. It will be seen that the defendant *received* the money sued for *at least as late as June* 5, 1870, *four days before petition for bankruptcy was filed.* [Record, p. 24.] Jenkins swears, [see record. p. 25] "I told Mr. Ruhl" (he, Ruhl, was Secretary of the Bucyrus works,) "that Stewart, Porter & Co. were *hard up.* He asked me concerning the financial condition of Stewart, Porter & Co. I told him of the conversation I had had with Stewart, and what he said about the Texas matter. [For the Texas matter see record, p. 25.] I was acquainted with the fact that Stewart, Porter & Co. were hard up. Knew that some parties had taken goods for their debts. They had *stopped payment on all their paper for several weeks* before the petition was filed against them to have them declared bankrupt. *I told the defendant that Stewart, Porter & Co. were in failing circumstances, and that their paper had gone to protest.*" This was in *May*, 1870, [record, p. 25,] and *Jenkins* was *then* acting as *agent* for *defendants.* [Record, p. 25.]

This evidence I take to be conclusive of the defendants having "reasonable cause to believe, etc." The conclusion of the charge of the Circuit Court shows that defendants knew Stewart & Porter were insolvent.

VI. The only defense claimed in this case is, that at the time the contract was made the defendants believed Wallace was a member of the firm of Stewart, Porter & Co. This is the only pretended defense in the case. If it is valid, defendant must have judgment; if not, plaintiff must recover. Is this a defense? Wallace was and is insolvent, but if he was now entirely solvent, the defendants can recover whatever they sold Stewart, Porter & Co., under that contract from Wallace, because he represented himself at the time he made the contract as a member of the firm, and can't now deny it as to defendants. This is undoubtedly so, and if he is *solvent* they are not injured. If he be *insolvent* they are not injured, and why is it a de-

fense here if he represented himself a partner, and even if he was then a partner? If he in truth was then a member of the firm and was now solvent, he could be made liable on this contract. But the evidence shows he was not a member of the firm, and the defense must fail.

VII. If the judgment be for plaintiff it must be for $8,802.30, and interest at 6 per cent. from June 5, 1870, to this date.

For assignment of errors see record, page 28.

JAMES BAKER,
EWING & SMITH,
For Plaintiff in Error.

In the Supreme Court of the United States.

No. 184.

JOHN MONTGOMERY, Jr., Assignee of STEWART, PORTER & CO., Plaintiff in Error,

vs.

THE BUCYRUS MACHINE WORKS.

Appeal from the United States Circuit Court for the Western District of Missouri.

Argument for Defendant.

BARTLEY & JENNER and S. R. HARRIS,
ATTORNEYS FOR THE DEFENDANT.

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vs.

THE BUCYRUS MACHINE WORKS.

Appeal from the United States Circuit Court for the Western District of Missouri.

Statement of the Case.

The original action was brought to recover, as assets of the bankrupt firm of Stewart, Porter & Co., composed of John R. Stewart and William H. Porter, money alleged to have been paid to the defendant, by *way of preference*, in fraud of the provisions of the 35th section of the Bankrupt Act of 1867, the first clause of which is as follows, to wit:

"SEC. 35. *And be it further enacted*, That if any person, being insolvent, or in contemplation of insolvency, within four months of the filing of the petition by or against him, with a view to give a preference to any creditor or person having a claim against him, or who is under any liability for him, procures any part of his property to be attached, sequestered, or seized on execution, or makes any payment, pledge, assignment, transfer, or conveyance of any part of his property, either directly or indirectly, absolutely or conditionally, the person receiving such payment, pledge, assignment, transfer or conveyance, or to be benefited thereby, or by such attachment, having reasonable

cause to believe such person is insolvent, and that such attachment, payment, pledge, assignment, or conveyance is made in fraud of the provisions of this act, the same shall be void, and the assignee may recover the property, or the value of it, from the person so receiving it, or so to be benefited."

The amended petition alleges, in substance, the filing of the creditors' petition, the adjudication in Bankruptcy, the appointment of the plaintiff as assignee, the assignment to him, as such, of the effects of the bankrupt firm, and that, within four months before the filing of the petition in bankruptcy, said firm, being insolvent and indebted to the defendant, directed and consented, that Case & Larkin, Brown, Clay & Co., Manny & Co., and Thomas Kirkpatrick, should severally pay to the defendant the moneys due from these parties to said firm, and that the moneys were so paid to the defendant, with a view of giving a preference, the defendant at the same time having reasonable cause to believe said firm to be insolvent. The petition sets out an alleged contract entered into on the 14th day of January, 1870, by said firm with the defendant for the sale of machines, (Mowers and Reapers,) and alleges, that the indebtedness of said firm to the defendant grew out of machines furnished to said firm under such contract.

The answer puts in issue all the material allegations of the petition, and then avers, that the contract set out in the petition was not made with a firm of Stewart, Porter & Co., composed of John R. Stewart and William H. Porter, but with a firm of Stewart, Porter & Co., composed of said Stewart and Porter and one John A. Wallace. That the defendant at no time had any dealings with a firm of Stewart, Porter & Co., composed of said Stewart and Porter—at no time received any payments *from such firm*—and was at no time *a creditor of such firm*. That the debt alleged to be due from said Stewart & Porter, was in fact, due from said Stewart, Porter and Wallace, and that the alleged

payments were in fact made on a debt due from said Stewart, Porter and Wallace. The answer further avers, that the defendant was induced to deal with said firm last mentioned and to give it credit, by certain false and fraudulent representations of said Wallace, while acting as the agent and alleged partner of Stewart & Porter, as to the solvency of said firm and its members, and as to the persons who composed its members, and that defendant had no notice that there was such a firm as Stewart, Porter & Co., composed of said Stewart & Porter alone, until after the adjudication in Bankruptcy; but that the defendant at all times dealt with the firm as composed of Stewart, Porter & Wallace.

The counsel on both sides waived a jury and submitted the cause to the Court, upon an agreed statement of facts, (to be found in the record commencing on page 19,) from which it appears, that the creditors' petition in bankruptcy was filed June 9, 1870, and the adjudication had June 14, 1870; and that the plaintiff had duly qualified as the assignee in bankruptcy of the firm of Stewart, Porter & Co., composed of John R. Stewart and William H. Porter. It was understood, however, and agreed at the time the partnership was formed, that the said John A. Wallace was to be connected with the firm *at his own option*, and that he might consider himself as a partner or not as he chose, the word "Co." being added to the firm name in order to include Wallace. With this understanding, Stewart & Porter sent Wallace to Bucyrus, Ohio, where the defendant was engaged in manufacturing mowers and reapers, with authority to negotiate for and purchase machines, either *as their agent or as a member of the firm*, under the firm name of Stewart, Porter & Co., as he might choose. At this time defendant had had no dealings whatsoever with Stewart, Porter & Co., and knew nothing of the firm, or as to the persons who composed it, except what it then learned from said Wallace. In reply to inquiries of de-

fendant, Wallace represented that the firm was composed of Stewart, Porter and himself; that it was solvent, in good credit, doing a prosperous business, and that Porter alone was worth sixty thousand dollars. Upon these representations the defendant, on the 14th day of January, 1870, was induced to enter into a contract with the firm of Stewart, Porter & Co., composed of said Stewart, Porter & Wallace, said contract being signed and executed by said Wallace for said firm and as a member of the same, and it is admitted that he was authorized by said Stewart & Porter to so sign and execute the contract. By the terms of this contract the defendant sold to said Stewart, Porter & Wallace, under the firm name of Stewart, Porter & Co., one car load of machines, and agreed thereafter to fill such orders as might be sent by said firm so composed for other machines, at the price of $185 for each machine, less a discount of 22 per cent. Wallace returned from Ohio, and travelled for some time trying to sell the machines he had so purchased, but not meeting with the success he expected, he then notified Stewart & Porter that he would not become a member of the firm, and was not thereafter considered by them or himself as a member. Of this, however, the defendant had no notice until after the bankruptcy of Stewart & Porter. After this, but without any notice to defendant that Wallace was not still a member of the firm, Stewart & Porter, under the firm name of Stewart, Porter & Co., under the said contract so entered into by Wallace, ordered machines shipped from Bucyrus, Ohio, to Brown, Clay & Co., of Pleasant Hill, Mo., to Case & Larkin, of Warrensburg, Mo., to Thomas Kirkpatrick, at Knob Noster, Mo., and to Manny & Co., at St. Louis, Mo., and that the money due on these machines, amounting in the aggregate to some eight thousand dollars, was paid over to the defendant by these parties severally on said contract by direction of Stewart, Porter & Co. on the 5th day of June, 1870, before the commencement of proceedings in bankruptcy, in payment for machines

sold Stewart, Porter & Wallace under said contract, and without any notice to the defendant that Wallace was not a member of the firm, but that in selling the machines under the original contract, in shipping to Brown, Clay & Co. and others on subsequent orders of Stewart, Porter & Co., and in receiving payments from Brown, Clay & Co. and others, the defendant dealt with Stewart, Porter & Co, as a firm composed of Stewart, Porter & Wallace. It is admitted that at the time of said payments the firm of Stewart, Porter & Co., composed of Stewart & Porter, was insolvent, and that Stewart, Porter & Wallace are each individually insolvent, and that the firm of Stewart, Porter & Co. will not pay more than five cents on the dollar. It is also admitted that Stewart, Porter & Wallace owed no debts except to the defendant, and that no proceedings in bankruptcy have ever been commenced against them as a firm. It is admitted that the representations of Wallace as to the solvency of the firm, and that Porter was worth sixty thousand dollars, were severally untrue, and known so to be by him at the time he made them. The facts agreed upon tend to show, that his other representations were untrue, and that he knew them to be so. It is agreed, however, that Stewart and Porter did not authorize him to make any false statements. It is agreed, that the payments were made June 5, 1870, and the statement of Jenkins, (see Record, p. 25,) which by agreement was admitted in evidence, tends to show, that the defendant, in May, 1870, had notice that the firm of Stewart, Porter & Co. was in failing circumstances. It is admitted, however, that defendant did not have notice that said firm was composed only of Stewart & Porter until after the Bankruptcy.

ARGUMENT.

Upon the pleadings and evidence the following questions arise:

1st. Whether in the purchase of these machines, Stew-

art, Porter & Wallace were in fact partners, and whether the proceeds of the sale of the machines may be considered as assets of such partnership and applied to the payment of its debts.

2d. Whether, if they were not in fact partners, from the actual relation of the parties, &c., the acts and representations of Wallace, and the action of defendant thereon, the plaintiff is estopped to deny that such partnership existed in fact.

3d. Whether the sale by reason of the false representations of Wallace was procured by fraud, and if so, whether the defendant can make this available as a defense to the action.

I.

The suit is brought by the assignee of John R. Stewart and William H. Porter, composing the firm of Stewart, Porter & Co., to recover as assets of such firm, money alleged to be paid to defendant by way of preference within four months before the commencement of proceedings in Bankruptcy, and in fraud of the provisions of the first clause of Sec. 35 of the Bankrupt Act, above recited.

In order to recover, the plaintiff must show the following facts, viz:

First. That the payment was within four months of the commencement of the Bankruptcy proceedings, and that at the time of the payment, Stewart, Porter & Co., composed of Stewart and Porter, was insolvent.

Second. That at the time of such payment the said firm, composed as last aforesaid, was indebted to the defendant, the Bucyrus Machine Works.

Third. That said firm composed as last aforesaid, made such payment, and with a view of giving a preference to the defendant over its other creditors.

Fourth. And that the defendant at the time of such payment had reasonable cause to believe said firm composed as last aforesaid was insolvent, and that a fraud on the Bankrupt law was intended thereby.—(See Bump's Bankruptcy, 7th Ed., page 681, and authorities there cited.)

Failing to establish *any one* of these facts the plaintiff cannot recover in this action.

As to the first.—The payment within four months, and the insolvency of the firm of Stewart, Porter & Co., composed of Stewart and Porter, are admitted.

As to the second.—Upon the agreed statement of facts it appears, and in fact is expressly admitted, that the defendant never at any time sold any machine, nor had any dealings with, nor was at any time a creditor of the firm of Stewart, Porter & Co., composed of John R. Stewart and William H. Porter.

As to the third.—There is no evidence that Stewart and Porter, composing the firm of Stewart, Porter & Co., either made the payment at all or made it with intent to give a preference over creditors of that firm. On the contrary, it is admitted that defendant was not a creditor of that firm, and the payment was made and received as a payment on a contract expressly made by them on a debt of Stewart, Porter & Co., composed of Stewart, Porter and Wallace.

As to the fourth.—The evidence tends to show that at the time of the payment defendant had reasonable cause to believe that the firm of Stewart, Porter & Co., was in failing circumstances, and contemplating insolvency. But it had no notice of a firm composed of Stewart & Porter alone until after the Bankruptcy, (Vide, p. 11, Exhibit "A,") having always dealt with Stewart, Porter & Co., as Stewart, Porter & Wallace. But the defendant had no cause to believe that a fraud on the Bankrupt law was intended. If the defendant believed that the firm with which it was

dealing was insolvent, it was simply mistaken, as the evidence shows that it owed no other debts except that to defendant, and that no proceedings in Bankruptcy had been commenced against it, (Vide, pp. 9 and 10, Exhibit "A.") Wherefore, as the firm with which the defendant contracted was not insolvent, and no proceedings in bankruptcy were ever instituted against it, no preference under the bankrupt law or belief of insolvency or payment in fraud of that act could be charged as to that firm.

II.

If it be held upon the facts stated, either that Wallace was in fact a partner up to the time he gave notice that he would not become a member of the firm, or that he became a partner only as to the transaction and contract with the defendant, then he or either of the other partners might apply the property or its proceeds purchased by Stewart, Porter & Wallace to the payment of the debts of Stewart, Porter & Wallace, as was done in this case.

Story on Partnership, 3,326 and 3,328.

In case of disolution each partner holds the joint property, clothed with a trust to apply it to the payment of the firm's debts.

Touching the point as to the persons composing, or who should compose, the firm of Stewart, Porter & Co., the following is contained in the agreed statement of facts. (See p. 24 of Record.)

"And as to this point we agree as follows, viz: that said firm was formed about the first of January, 1870, and by the terms of this original agreement was composed of the said John R. Stewart and Wm. H. Porter, it being at the time of its formation left *optional with the said John A. Wallace to become a member of the firm or not, and the 'Co.' being added to the firm name in order to include said Wallace if he chose to come in; that with this understanding and with authority from said Stewart & Porter, to act and contract for machines*, either as their agent *or as a member of the firm*, he went on to Bucyrus, Ohio, and made the rep-

resentations, *and entered into the contract* set out in the plaintiff's amended petition," &c.

It was not necessary, that Wallace should sign the partnership contract in order to become a member of the firm. The name and style of the firm were made to include him. The other members of the firm, Stewart and Porter, had agreed to take him in, so that his association as a partner in the firm simply required his own consent and co-operation. He was authorized to make contracts *as a partner* and thereby make himself a member of the firm, if he chose to do so, when he went to Ohio. He elected to become a member of the firm, as is shown by his declaring himself a partner to the defendant, and contracting and dealing with the defendant for the firm of Stewart, Porter & Co., as composed of Stewart, Porter and himself. Wallace, therefore, clothed with full authority actually became a partner or member of the firm at least for a time, or so far as the contract and dealings with the defendant was concerned. Here were all the elements of a partnership composed of the three members of the firm, and a partnership name designed to include the three. Whether Wallace was allowed to retire from the firm and did so retire afterwards, is a question not involved here. It is admitted, that the contract and dealings of the defendant with Stewart, Porter & Co. was with that firm composed of Stewart, Porter & Wallace, and it is also admitted, that no bankruptcy proceedings have ever been instituted against that firm composed of those three partners.

III.

There is yet another ground of defence, which is equally clear and conclusive.

If an equitable estoppel is to be sustained at all, it is conclusive in this case. The doctrine of equitable estoppel has been repeatedly recognized and declared by this Court. In the case of Sprigg vs. Bank of Mount Pleasant,

10 Pet., 257, it was held, that, in its application to the dealings and contracts of men it is a salutary rule, that a man shall not be permitted to deny what he has once deliberately declared, and upon which another has acted and changed his condition in relation to the property in question. This doctrine of equitable estoppel is still more forcibly enunciated in Swain vs. Seamens, 7 Wall., 254; and in Bronson vs. Chappell, 12 Wall., 681; New England Car Spring Co. vs. Union India Rubber Co., 4 Blatchf., 1; also Taylor & Mason vs. John & Jacob Zepp., 14 Mo. R., 482; and Newman vs. Hook, 37 Mo., 207. In Chouteau vs. Goddin, 37 Mo., 229, the rule is stated to be, "that where a party by his acts or words causes another to believe in the existence of a certain state of facts and induces him to act on that belief so as to alter his own previous condition, he and also a person for whom he is acting as agent, will be concluded from averring anything to the contrary as against the party so altering his condition.

In Rice vs. Bunce, adm'r of Seely, 49 Mo., 231, it was held, that to constitute an estoppel *in pais*, it was not necessary that the party *should design* to mislead. If the act was calculated to mislead and has misled, it is sufficient. See also Horn vs. Cole, 12 Am. Law, Reg. 303, (May No., 1873,) in which this doctrine is fully discussed and the authorities cited.

The agreed statement of facts, clearly bring this cause within the rule laid down in the foregoing cases:

1st. The representation as to who composed the firm, was authorized to be made, or if not authorized, was to a fact peculiarly within his knowledge, and about which the other party knew nothing except upon his representation. It was made as to a *material* matter, for it was with reference to the *parties* to the contract itself.

2d. By this representation, the defendant was induced to believe that the firm of Stewart, Porter & Co., was composed of Stewart, Porter & Wallace, and to sell it as such

a large amount of property. It is admitted in the agreed statement (Exhibit "A") that the sale would not have been made but for this representation as to the co-partnership, and the belief that it was true.

3d. The defendant will suffer wrong and injury by allowing this representation as to who composed the firm to be disproved; for it is admitted that, the firm of Stewart, Porter & Co., composed of Stewart & Porter, is not indebted to defendant, and therefore defendant could not prove any claim against said firm or share in its assets; or, if it could so prove, it is admitted that the estate will not pay more than five cents on the dollar. It could have no available remedy against Stewart, Porter & Wallace individually, for it is admitted that they are insolvent.

We insist that defendant, upon the facts in this case, stands in the position with reference to Stewart & Porter and their assignee, as if there had been in fact two firms of Stewart, Porter & Co.,—one composed of Stewart & Porter, and the other of Stewart, Porter & Wallace, with the latter of which, defendant had all its dealings. In such case the bankruptcy of the first firm would not in any manner affect defendant's dealings with the second. It is expressly admitted that defendant at all times dealt with Stewart, Porter & Co., as composed of Stewart, Porter & Wallace, and that it had no knowledge to the contrary until after the said bankruptcy, and until after the payment of the money; for the payment was made June 5, 1870. (See Exhibit.) The petition in bankruptcy was filed June 9, 1870, and the adjudication had on the 14th June, 1870. (Exhibit A.) It is admitted that no bankruptcy proceeding has ever been commenced against Stewart, Porter & Wallace, and that they as a firm owed no debts except that to the defendant, which has been paid.

IV.

It is admitted, that the representation of Wallace that Porter was worth sixty thousand dollars, and that as to the

solvency of the firm, were false, and that he so knew at the time he made them. (See Exhibit in Record.) It is also admitted he was the agent of Stewart & Porter, and as such, authorized to negotiate for them and purchase machines. He was *acting within* the *scope* of his authority. His representations and his knowledge were their representations and knowledge.

The defendant had a right to rescind the contract made with Stewart, Porter & Wallace, on the ground of fraud, and to follow its property or the proceeds thereof, wherever it could be found. In full recognition of this right, the proceeds of the sales of the very property obtained from the defendant by fraud, were paid to defendant as equity and good conscience required. If now the provisions of the bankrupt law mentioned could be used to enable the assignee of Stewart & Porter alone to recover back from the defendant the proceeds of its own property, fraudulently procured from it on a contract with Stewart, Porter & Wallace, then that enactment would become an instrumentality of defeating a most manifestly equitable transaction, and of fostering and consummating a stupendous fraud beyond the reach of any remedy known to the law.

BARTLEY & JENNER, AND
S. R. HARRIS,
Attorneys for the Defendant.